YKK (MALAYSIA) SDN BHD v. PENGARAH TANAH DAN GALIAN JOHOR

HIGH COURT MALAYA, JOHOR BAHRU
AHMAD KAMAL MD SHAHID JC
[ORIGINATING SUMMONS NO: JA-24NCVC-549-08-2016]
10 JANUARY 2018

LAND LAW: *Lease – Breach – Special conditions of lease provides lessee with option to renew for new term – Lessor informed lessee that leases would not be renewed to give effect to State Government's future development plans – All lease renewal applications frozen – Whether lessor's refusal to renew lease constituted breach of option to renew provided in special conditions of lease – National Land Code*

On 31 July 1960, the State Authority of Johor ('the SA') had alienated a land for a term of 60 years ('the lease'). The lease expires on 30 July 2020. The land was located in the Larkin industrial area ('Larkin area') which comprised factories from the manufacturing industry. The land was to be used solely for the erection of factory building. The plaintiff acquired and registered the lease on 9 March 1980, therefore acquiring more than 40 years of the unexpired portion of the lease. Clause 7 of the special conditions of the lease provides the plaintiff with an option to renew for a new term of 30 years ('option to renew'). The defendant later informed the plaintiff that they would be issuing a notice to all the factory owners that the defendant would not be renewing the leases in the Larkin area to give effect to the State Government's future development plans for the area and that it had taken steps to freeze all lease renewal applications. The defendant refused to provide the relevant renewal forms, including Form 12A, to the plaintiff despite various attempts to obtain them. The plaintiff was further informed by the defendant that the SA had decided to convert the Larkin area into a housing area and had accordingly frozen all lease renewal applications. In 2015, the plaintiff gave notice to the defendant of its liberty to exercise the option to renew ('renewal notice'). However, the defendant, to date, has not responded to the renewal notice. In the present application, the plaintiff sought (i) specific performance of cl. 7 of the special conditions to the lease ('prayer 1'); (ii) order that the defendant (a) issue Form 12A pursuant to s. 197 of the National Land Code, Borang Jadual 1 to the Johor Land Rules and all the other relevant and necessary forms and/or documents to the plaintiff; and (b) inform the plaintiff the sums payable as the appropriate premium based upon the undeveloped value of the land and rent at the current rates. As an alternative to prayer 1, the plaintiff sought a declaration that (i) the defendant's decision to freeze the plaintiff's right to exercise cl. 7 of the special conditions to the lease was (a) illegal and *ultra vires* the powers of the defendant and/or the provisions of the NLC and a breach of the

plaintiff's rights under the lease and/or Federal Constitution; and/or (b) a breach of the special conditions to the lease; (ii) the plaintiff was entitled to exercise its right pursuant to cl. 7 of the special conditions to the lease; and (iii) damages. The sole issue that arose for the court's determination was whether the defendant's refusal to renew the plaintiff's lease constituted a breach of the option to renew in cl. 7 of the special conditions of the lease.

Held (granting order in terms):

(1) The language of cl. 7 was clear and unambiguous and it gave the plaintiff a guaranteed and automatic right to a renewal of the lease. Clause 7 created a binding obligation on the defendant to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate premium and surrendering the current lease. By its refusal to provide the relevant renewal forms, the defendant had made it clear that it would not honour its obligation to renew the lease and was therefore in breach of cl. 7. The defendant had also exceeded its power by refusing to renew the lease and the decision was unlawful, illegal and *ultra vires* the powers of the defendant, provisions of the NLC and a breach of the plaintiff's right under the lease. (paras 29, 30, 44 & 47)

(2) Even if the defendant was able to show that it possessed a power in deciding whether to renew the lease, the apex court had held that in situations where the NLC confers a power and/or discretion, the exercise of such power and/or discretion was always the subject of judicial scrutiny. As such, the apex court had rejected the argument that the NLC conferred an absolute power or discretion on the defendant. (para 42)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Chong Pak Kwan @ Chong Shiu Fai v. Kong Chung Loi @ Kong Sung Loi & Others [2002] MLJU 435 ***(refd)***

Collector of Land Revenue Johor Bahru v. South Malaysia Industries Bhd [1978] 1 LNS 39 FC ***(refd)***

Evergreen Frontier (M) Sdn Bhd v. The Director of Lands and Surveys (Sabah) & Anor [2004] 8 CLJ 156 HC ***(refd)***

Kelana Megah Development Sdn Bhd lwn. Kerajaan Negeri Johor & Satu Lagi [2015] 1 LNS 985 HC ***(refd)***

Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor) [2015] 2 CLJ 10 CA ***(refd)***

Michael C Solle v. United Malayan Banking Corporation Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2015] 3 AMR 35 ***(refd)***

Legislation referred to:
National Land Code, ss. 42, 76, 120, 197, 418
Rules of Court 2012, O. 53

For the plaintiff - Ravindran Shanmuganathan; M/s Sreenevasan Young
For the defendant - Nurul Izalina Rajaai; FC

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid JC:

Introduction

[1] This is an application by the plaintiff by way of originating summons (OS) dated 15 August 2016 (encl. 1) for the following orders:

(i) Specific performance of cl. 7 of the special conditions to the lease dated 31 July 1960 in respect of the land described as HSD 4981, Lot TLO 6893, Bandar Johor Bahru, Johor Bahru, Johor ("the land").

(ii) Consequent upon prayer 1, that the defendant do, within 14 days of this order;

(a) issue Borang 12A pursuant to s. 197 of the National Land Code, (NLC) Borang Jadual 1 pursuant to the Johor Land Rules and all the other relevant and necessary forms and/or documents to the plaintiff; and

(b) inform the plaintiff the sums payable as the appropriate premium based upon the undeveloped value of the land and rent at the current rates

to enable the plaintiff to surrender the lease and obtain in exchange thereof a new lease for a term of 30 years from the date of the plaintiff's exercise of the option pursuant to cl. 7 of the special conditions to the lease.

(iii) As an alternative to prayer 1, a declaration that:

(a) the defendant's decision to freeze the plaintiff's right to exercise cl. 7 of the special conditions to the lease dated 31 July 1980 in respect of the land is:

(i) illegal and *ultra vires* the powers of the defendant and/or the provisions of the NLC and a breach of the plaintiff's rights under the lease and/or the Federal Constitutions; and/or

(ii) a breach of the special conditions to the lease; and/or

(b) the plaintiff is entitled to exercise its rights pursuant to cl. 7 of the special conditions to the lease.

(iv) General damage;

(v) Aggravated or exemplary damages;

(vi) Interest at the rate of 5% per annum on the damages awarded pursuant to prayer 3 from the date of this order until full realisation;

(vii) Costs;

(viii) Such further or other relief deemed fit, just, appropriate and/or necessary by this honourable court.

[2] The following affidavits have been filed pursuant to the OS (encl. 1).

(i) the plaintiff's affidavit no: 1 affirmed by Keiichi Ogawa on 15 August 2016.

(ii) the defendant's affidavit in reply affirmed by Amirul Haffiz bin Ariff on 22 September 2016.

(iii) the plaintiff's affidavit no. 2 affirmed by Keiichi Ogawa on 4 October 2016; and

(iv) the plaintiff's affidavit no. 3 affirmed by Keiichi Ogawa on 5 June 2017.

Salient Facts

[3] The plaintiff is a company incorporated pursuant to the Companies Act 1965 and has its registered address at No. 19, Jalan Bakti, Larkin Industrial Area, 80350 Johor Bahru, Johor.

[4] On 31 July 1960, the State Authority alienated the land for a term of 60 years ("the lease"). The lease expires on 30 July 2020.

[5] The land is located in the Larkin industrial area (Larkin area) which comprises of factories from the manufacturing industry. The land was to be 'used solely for the erection of factory building'.

[6] The plaintiff acquired and registered the lease on 9 March 1980, thereby acquiring more than 40 years of the unexpired portion of the lease.

[7] Clause 7 of the special conditions of the lease provides the plaintiff with an option to renew the lease for a new term of 30 years ("option to renew") (exh. KO2). It reads as follows:

> 7. At any time not less than six months before the date of expiration of this lease the lessee may, at his option exercised in writing and upon payment of an appropriate premium based upon the undeveloped value of the land and rent at then current rates, surrender this lease and obtain in exchange therefore a new lease for the term of 30 years from the date of his exercise of the said option. Such new lease shall be subject to all the terms and conditions of this lease except the option by this condition conferred.

[8] On 13 March 2014, a meeting between the defendant and the plaintiff's representatives, the defendant later informed that they would be issuing a notice to all the factory owners that the defendant would not be renewing the leases in the Larkin area to give effect to the State Government's future development plans for the area and that it had taken steps to freeze all lease renewal applications. A copy of the meeting minutes issued by the defendant dated 28 April 2014 is exhibited in exh. KO3.

[9] The defendant has refused to provide the relevant renewal forms, including Form 12A, to the plaintiff despite various attempts to obtain them.

[10] The defendant, by a letter dated 18 August 2015 (exh. KO4) informed the plaintiff that the State Authority has decided to convert the Larkin area into a housing area and had accordingly, frozen all lease renewal applications.

[11] On 24 August 2015, the plaintiff gave notice to the defendant of its liberty to exercise the option to renew ("renewal notice") and asked the defendant to inform the plaintiff of the appropriate premium based on the undeveloped value of the land and the current rental rate that as payable. (exh. KO5)

[12] Despite a reminder being issued on 12 November 2015, the defendant has, to date, not responded to the renewal notice. (exh. KO 6)

The Plaintiff's Argument

[13] The plaintiff is a subsidiary of YKK Holding Asia Pte Ltd, and is the headquarters for the Asia Region for YKK Corporation, which is located in Japan ("YKK Japan").

[14] YKK Japan is the world largest manufacturer of slide fasteners or zips. As early as the 1960s, YKK Japan decided to set up a manufacturing plant in Malaysia.

[15] In 2007, the plaintiff decided to consolidate its operations from Singapore to Malaysia, thereby making Malaysia the regional supply base to export to processing customers in the region. The plaintiff has, from 1997 to 2016, invested a total of about RM75,872,175 in its operations in Malaysia.

[16] The plaintiff made its investments and acquired the lease in reliance on the option to renew as the plaintiff would be guaranteed the use of the factory and its operation in the Larkin area until at least 2050.

[17] The defendant has displayed and exhibited a clear and unequivocal intention not to honour the option to renew and to act in breach thereof ("decision").

[18] The defendant's decision will cause irreparable loss and damage to the plaintiff which cannot be adequately compensated by an award of damages.

[19] The defendant's decision is illegal and *ultra vires* the powers of the defendant and/or the provisions of the NLC and a breach of the plaintiff's rights under the lease and/or the Federal Constitution.

The Defendant's Argument

[20] The learned Federal Counsel (FC) argues that the defendant has the absolute power to approve the grant of lease and/or an extension thereof. Hence, the plaintiff does not have an automatic right to a renewal of the lease.

[21] The defendant relies on the decision of *Kelana Megah Development Sdn Bhd lwn. Kerajaan Negeri Johor & Satu Lagi* [2015] 1 LNS 985 to support its arguments.

[22] The learned Federal Counsel also raises two procedural objections in her written submission. These were on the contention that the plaintiff had failed to appeal to the court under s. 418 of the NLC and the plaintiff ought to have filed a judicial review if indeed the plaintiff was aggrieved by the defendant's decision.

The Law

[23] The position of the State Authority in land matters is paramount and subservient to none. The extent of the State's powers of disposal are described in s. 42 of the NLC which is basically five-fold and among others is to alienate State land for a term of years not exceeding 99 years or in perpetuity pursuant to s. 76 of the NLC.

[24] In addition to these wide powers of disposal, the State Authority has an undefined and unlimited discretion to impose any express terms and conditions upon initial alienation as provided under s. 120 of the NLC.

[25] However, based on the Federal Court decision in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, s. 76 of the NLC does not confer on the defendant an unfettered prerogative power. This is especially so in the present facts given the language of cl. 7.

Findings Of This Court

[26] Having fully and carefully considered the plaintiff's case as well as the defendant's and issues raised in the written submissions, I now come to a decision as follows:

[27] In my opinion, there is only one issue which lies at the heart of this case. It is whether the defendant's refusal to renew the plaintiff's lease constitutes a breach of the option to renew in cl. 7 of the special conditions of the lease.

[28] Clause 7 states that:

> 7. At any time not less than six months before the date of expiration of this lease the lessee may, at his option exercised in writing and upon payment of an appropriate premium based upon the undeveloped value of the land and rent at then current rates, surrender this lease and obtain in exchange therefore a new lease for the term of 30 years from the date of his exercise of the said option. Such new lease shall be subject to all the terms and conditions of this lease except the option by this condition conferred.

[29] It is my finding that cl. 7 creates a binding obligation on the defendant to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate premium and surrendering the current lease.

[30] The defendant, by its letter dated 18 August 2015 and by its refusal to provide the relevant renewal forms, has made it clear that it will not honour its obligation to renew the lease and is therefore in my view in breach of cl. 7.

[31] My interpretation is based on a plain and literal reading of cl. 7, which in my view is consistent with the intention of the parties. In *Michael C. Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267; [1986] 1 MLJ 45, the Federal Court held that:

> the intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole agreement.

[32] Further, in *Collector of Land Revenue Johor Bahru v. South Malaysia Industries Bhd* [1978] 1 LNS 39; [1978] 1 MLJ 130, Raja Azlan Shah FCJ (as His Highness then was) speaking for the Federal Court held:

> **we must construe the special conditions endorsed on the document of title as they stand and as a whole to see what is the intention of the parties** ... (emphasis added)

[33] The court is of the considered view that based on the authorities above and from the language which they have used in cl. 7, the words contained therein are clear and unambiguous, it shows clear intention of the State Authority to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate premium and surrendering the current lease. In gist, cl. 7 grants plaintiff the right to an automatic renewal.

[34] Therefore, the defendant's refusal to grant a new lease of 30 years constitutes a breach of cl. 7.

[35] A somewhat similar situation arose in *Evergreen Frontier (M) Sdn Bhd v. The Director of Lands and Surveys, Sabah & Anor* [2004] 8 CLJ 156; [2005] 2 MLJ 644.

[36] In this case, the second defendant had offered to alienate land to the plaintiff, who accepted the offer and duly complied with the condition of the offer by paying RM125,750 representing 50% of the premium payable. The second defendant later refused to alienate the land and the plaintiff commenced proceedings for breach of the agreement to alienate the land. Subsequently, the parties reached an amicable settlement whereby the first defendant offered to amend the offer by replacing and substituting the land with another piece of land. The plaintiff accepted this offer and spent a sum of RM15,965 as survey fee for the replacement land. Later, the first defendant unilaterally withdrew the offer. The High Court held in favour of the plaintiff, Linton Albert JC (as he then was) said:

> [9] ... Our courts, particularly in more recent times, do not countenance statutory provisions which purport to exclude judicial scrutiny of the exercise of discretion by public officers especially where the discretion is exercised unreasonably or in utter disregard for accepted notions of justice and fairness. Here, the defendants have sent the plaintiff on a wild-goose chase for 22 years, in the course of which the plaintiff paid a substantial sum of money to the Defendants or authorities related to them and not a sen has been refunded to the plaintiff. If what the plaintiff went through do not constitute an injustice, I do not know what will ...
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> [13] The issuance of the said letter to the plaintiff and its unconditional acceptance by the plaintiff undoubtedly constitute a binding contract between the plaintiff and the second defendant. The fact that both parties agreed on the sole issue set out above incontrovertibly implies admission of the existence of a binding contract. *The second defendant cannot, for the reasons I have stated earlier, wriggle out of the agreement to alienate the replacement land simply by issuing the withdrawal letter. I therefore hold that the plaintiff has successfully established its claim*, which brings me to the final question of the reliefs sought by the plaintiff. (emphasis added)

[37] The decision in *Chong Pak Kwan @ Chong Shiu Fai v. Kong Chung Loi @ Kong Sung Loi & Others* [2002] MLJU 435 also makes it clear that an approved land application creates rights on behalf of the applicant which are capable of being the subject-matter of a contract.

[38] One of the issues in this case was the question of "whether there is any interest under land application capable of being sold before the subject lands are alienated to the applicants". In answering the question in the affirmative, Richard Malanjum J (as he then was) said:

> [8] In respect of issue (i) it is a question of law ... [10] I think it is quite a settled law that contractual rights can be created involving approved land application .... it is the stand of the Defendants that approval should involve registration of ownership or at least acceptance of the offer to alienate by the authority and nothing less. Thus to the Defendants mere approval of land application gives nothing to an applicant.
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> [11] With respect I think equating registration to an approval is too onerous a condition. In my view registration is the final step in an alienation process of land under the Ordinance. Prior to registration an approval is given in accordance with the provision of the relevant law and in this case the Ordinance ... *Since the land applications were approved there should therefore be 'rights' conferred at the material time capable of being a subject matter of a contract.* I am therefore inclined to agree with the legal prepositions in the cases cited by learned counsel for the Plaintiff herein. Accordingly I would answer issue (i) in the affirmative. (emphasis added)

[39] Based on the above decisions, it is my considered view that cl. 7 creates a contractual right in favour of plaintiff which is binding upon the defendant.

[40] The defendant relying on the decision of *Kelana Megah (supra)* and argues that the defendant has the absolute power in deciding whether to renew the lease, cannot hold water and devoid of merit by reason that it goes contrary to the clear wording and/or language of cl. 7.

[41] The decision in *Kelana Megah (supra)* is of no assistance whatsoever to the defendant as that case concerned the right of the State Government to compulsorily acquire land pursuant to the Land Acquisition Act 1960 and thereafter grant a lease to Petronas pursuant to its power under s. 76 of the NLC. The facts of *Kelana Megah* therefore can be distinguished from the facts of the present case.

[42] Even if the defendant is able to show that it possesses power in deciding whether to renew the lease, our apex court has held that in situations where the NLC confers a power and/or discretion, the exercise of such power and/or discretion is always subject to judicial scrutiny. As such, the apex court has rejected the argument that the NLC confers an absolute power or discretion on the defendant.

[43] The Federal Court in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd (supra)* at p. 148 through the speaking judgment of Raja Azlan Shah (as His Highness then was) had this to say:

> ... I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under section 124 or impose such conditions or other requirements as the Committee thinks fit. I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite (ante)* and its progeny compel me to reject it and to uphold the decision of the learned judge. *It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen; so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place.* (per Danckwerts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434 442.)
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> The Land Executive Committee is a creature of statute, and therefore possesses only such power as may have been conferred on it by Parliament. Therefore when a power vested in it is exceeded, any act done in excess of the power is invalid as being *ultra vires ... For the above reasons, it does not seem to me that the decision of the Land Executive Committee can possibly be regarded as reasonable or as anything other than ultra vires. It had exceeded its power and the decision was therefore unlawful as being an unreasonable exercise of power not related to the permitted development and for an ulterior purpose that no reasonable authority, properly directing itself, could have arrived at it. The Committee, like a trustee, holds power on trust and acts validly only when acting reasonably.* (emphasis added).

[44] Reverting to the instant case, I am of the view that the defendant has bound itself by cl. 7, thereby giving up the discretion it may have in respect of renewing the lease. The language of cl. 7 is clear and unambiguous and it gives the plaintiff a guaranteed and automatic right to a renewal of the lease.

[45] It is to be noted that the plaintiff's decision to acquire the lease was in reliance on cl. 7 which would guarantee its operations and the use of the said factory in the Larkin area until at least 2050. The plaintiff has successfully detailed the commercial reasons for its decision to acquire the lease and its decision to invest about RM75 million in its operations in Malaysia from 1997 to 2016.

[46] Based on those facts and on the clear wording of cl. 7, the plaintiff therefore has a legitimate expectation that upon serving the renewal notice to the defendant, paid the appropriate premium and surrendered the current lease, the plaintiff had the right to an automatic renewal and the defendant is obliged to grant a new lease of 30 years to the plaintiff.

[47] For the above reasons, I am of the considered view that the defendant has exceeded its power by refusing to renew the lease and the decision was therefore unlawful, illegal and *ultra vires* the powers of the defendant, provisions of the NLC and a breach of the plaintiff's right under the lease.

Procedural Objections

[48] The learned Federal Counsel raises two procedural objections in her written submission. The procedural objections were premised on the contention that the plaintiff had failed to appeal to the court under s. 418 of the NLC and ought to have filed a judicial review if indeed the plaintiff was aggrieved by the defendant's decision.

[49] The court was taken by surprise by the procedural objections taken by the defendant. The defendant never raised these two procedural objections in its affidavit nor is the same is given by way of a notice to the plaintiff before the trial. These objections have taken the plaintiff by surprise. The Court of Appeal recently addressed this point of law and procedure in *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35 at 44 where Hamid Sultan Abu Backer JCA said:

> [11] When there is no affidavit in opposition, preliminary objection relating to facts and law **ought not be entertained** as it will compromise the integrity of decision-making process as well as infringe on rules of procedure relating to affidavits. (emphasis added)

[50] Based on the above Court of Appeal decision, I am inclined to agree with learned counsel for the plaintiff's submission that this court should disregard the procedural objections by the defendant.

[51] Assuming that I was wrong in disregard the procedural objections by the defendant, I shall now proceed to consider and determine the procedural objections raised by the learned Federal Counsel.

Appeal Pursuant To s. 418 Of The NLC

[52] Section 418 of the NLC only applies to a "decision under this Act" ie, a decision made by the defendant pursuant to provisions of the NLC.

[53] The defendant here has refused to fulfil its obligation under cl. 7 and is therefore, in breach thereof. It is my view that the defendant's decision to act in breach of cl. 7 is not a "decision under this Act". As such, it is clear that s. 418 of the NLC is not applicable in the present case.

[54] Further, it is not mandatory for the plaintiff to the appeal procedure in s. 418 of the NLC. This is clear from the Court of Appeal decision in *Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor)* [2015] 2 CLJ 10; [2015] 1 MLJ 255 where Abdul Aziz Ab Rahim JCA said, at p. 32 (CLJ); p. 279 (MLJ):

> [46] Therefore in our view, it is not fatal to the appellant for not resorting to s. 418 of the NLC in order to challenge the decision of the land administrator.

Judicial Review

[55] The defendant also contended that plaintiff ought to have filed an application for judicial review pursuant to O. 53 Rules of Court 2012 by relying on the Federal Court decision in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145.

[56] In *Ahmad Jefri*'s case *(supra)*, the Federal Court was clear that if a person complains that a public authority has infringed his private rights then, although the complaint is a complaint against public authority, he is also entitled to commence a civil action and not resort to judicial review. James Foong FCJ explained the point at pp. 897-898 (CLJ); p. 172 (MLJ):

> [62] We observed that a challenge on the use of appropriate procedure is very much **fact based**. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant ... **But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable.** (emphasis added)

[57] Likewise, in *Leo Leslie Armstrong*'s case *(supra)*, the Court of Appeal applied the test in *Ahmad Jefri*'s case *(supra)* and held that since the plaintiff was complaining about the infringement of his private right, the plaintiff had the option of proceeding by way of judicial review or by ordinary action by way of originating summons. Abdul Aziz Ab Rahim JCA said, at p. 31 (CLJ); p. 278 (MLJ):

> [43] In the present case, though the appellant was challenging the decision of the land administrator who is a public authority, the rights that were affected by the decision are the **private rights** of the appellant, namely, the right to ownership and enjoyment of land ... Therefore, **the dominant issue in this case is the issue of a private rights.** Accordingly, the appellant has the option of either proceeding under O. 53 of the Rules of the High Court 1980 (now O. 53 of the Rules of Court 2012) or by ordinary action by way of originating summons. (emphasis added)

[58] Reverting to the instant case, the plaintiff's complaint is about the breach of its rights under cl. 7, which is a private right of the plaintiff. There is no evidence to suggest that any other member of public has a similar right to cl. 7. Therefore, there is no public law element involved in the facts of the present case.

[59] It is also worthy to note that before the decision, the plaintiff would able to enjoy tenure of a new lease for a term of 30 years (2050) however after the decision, that enjoyment was somehow affected and is now limited only to the year 2020. Therefore, the dominant issue in this case is the issue of private rights.

[60] Therefore based on the above authorities, I am of the view that the plaintiff is entitled to issue these proceedings by way of an originating summons.

Conclusion

[61] In conclusion, based on the foregoing reasons and analysis, I grant an order in terms sought in prayer (i), (ii)(a) and (b) of encl. 1 with costs of RM3,000 to the plaintiff subject to payment of an allocator fee.